



CLM 2018 Annual Conference
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**Working with Risk Managers—
Litigation, Settlement and Controlling the Defense**

Introduction:

This panel discussion will provide a detailed perspective of working with Risk Managers from four major international companies, each of which face a variety of claims and lawsuits on a daily basis. The overall theme of the panel will be controlling the defense. With different factual backdrops, including claims ranging from bodily injury to property damage to EPL to Professional Liability matters, the panel will discuss choice of counsel issues, managing deductibles and self-insured retentions, reporting requirements, dealing with coverage issues, strategic issues, including during discovery, settlement and at trial as well as billing issues.

Although the panel will primarily focus on the Risk Manager or party perspective, each of the presenters has a strong insurance and claim's background and the panel includes an insurance company representative and a defense attorney in order to address the various issues and hands-on examples from all perspectives, including potential conflicts, ethical issues and business decisions which are made daily while handling claims throughout the country.

Choice of Counsel Issues:

Quite simply, from the beginning of time or at least from the beginning of litigation as it currently exists, one of the first and most important issues of any party to a lawsuit is choosing the right counsel for the particular matter. This issue is oftentimes highlighted and disputed when insurance is involved in the defense because most typical Comprehensive General Liability policies as well as other types of insurance policies grant the insurer the right to choose counsel.

As a result, this decision is important because it not only is critical to obtain the properly skilled and experienced attorney for the matter, but also may lead to who controls the defense. In many cases, the interests of the insurance carrier and their insured are generally in line with each other, however, even in the perfect scenario, there may still be issues caused when a party does not have the right to choose their own counsel. For example, even if all of the claims and damages in the lawsuit are covered, the party wants to maintain its loss history in order to keep premiums on future policies under control. Further, the party may want to control future lawsuits by putting up a strong, sometimes costly defense, in order to minimize the snowball effect of future claims.

The right to choose counsel becomes even more important and oftentimes contentious when there is a reservation of rights and/or affirmative claims that are also being pursued in the same lawsuit. Here there may be conflicts between the interest of the party and their insurance carrier. Some states, including Florida and California, have enacted legislation governing how potential conflicts affect the insurer's defense obligation. California Civil Code Section 2860 provides:

“when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claims, a conflict may exist.”

In these situations, where the conflict is fact driven, meaning the counsel could arguably control the outcome of whether something is covered or not, the carrier must provide independent counsel at their expense. (See San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc. (1984) 208 Cal.Rptr. 494.) these issues must be recognized, addressed and analyzed by all involved, including the party, the carrier and the various counsel in the matter as it may significantly impact the defense and ultimate resolution of the matter.

As a result of these ever growing issues, the right to choose counsel has become an even bigger issue as parties now attempt to negotiate the right to choose their own counsel in their insurance policy by requesting an endorsement in their policy allowing them to choose counsel. Most carriers do not give up this right easily and certainly without some benefit flowing their direction and likely will put up a bigger fight at the time a lawsuit has been filed if they did not give up their right to choose counsel in the policy.

Ultimately, if the carrier does choose to utilize counsel of its choice, including most likely panel counsel or even in-house counsel, this may impact who controls the defense and again everyone involved in the lawsuit must carefully monitor the matter and assert their positions in order to protect their interests and rights now and in the future.

Costs of Defense:

Once the issue of counsel is resolved, there may still be on-going issues of the cost of defense, including managing deductibles and self-insured retentions which have risen each and every year in an apparent attempt to keep the cost of insurance down. Ultimately, the parties and their carriers may utilize different means and methods to monitor deductibles, self-insured retentions and even the fees and costs themselves.

This may result in disputes between the carrier and the party as to whether a full and complete defense is being provided and whether these issues impact the result through settlement or trial. These differences may lead to numerous disputes when the party asserts that the work is required in order to protect their interests, while the insurance carrier imposes limitations on the work that may be done. Further, carriers may consider cost of defense settlements, while the party may be impacted for years to come if a disputed liability matter is settled.

These issues and disputes have become even more significant as insurance companies limit the rates they will pay and oftentimes audit the invoices through outside services in order to minimize what they agree to pay for a defense. Budgets have now become the norm and most counsel recognize that they need pre-approval for work on behalf of their clients and ultimately who must approve these budgets, the work to be done and the time and rates charged are subject to further disputes between all involved. In fact, these disputes and the cost of defense may ultimately drive the litigation and result in disputes which may hinder resolution and/or the best defense and result. Again, many sophisticated parties are carefully monitoring these issues throughout a lawsuit or claim's life in order to protect their short and long term interests.

Reporting Requirements

Due to the on-going complexity of litigated matters around the country, as well as the tripartite relationship between counsel, the carrier and the client, it has become even more important to prepare regular status reports to both the client and the carrier so that both are kept apprised of all developments and ultimately approve all strategic decisions. Further, it must be recognized that the parties and the carriers may have different requirements, goals and needs in what is reported and when and how it is reported.

As a result, clear lines of communication should be established up front. In fact, in some cases, it may be prudent to have the client review the status reports before they are sent to the carrier and ultimately where coverage or potentially confidential issues may

exist, it may be necessary to provide separate reports to the client. This may be necessary in order to protect the client's interests and rights while again also respecting the rights of the carrier and counsel's obligations to them.

In fact, the Disciplinary Commissions of multiple State Bars have advised attorneys to error on the side of non-disclosure to the insurer if in the exercise of the attorney's professional judgment, there is a reasonable possibility for the waiver of the attorney client privilege could result and/or coverage could be limited.

Keeping in mind these potential pitfalls should cause counsel, parties and carriers to communicate up front, often and throughout in order to ensure that all are on the same page in handling a particular matter.

Case Handling:

Ultimately, as with all issues to be covered by this panel, the issue of control over the defense, including all strategic decisions right up through settlement or trial, lies at the heart of the ultimate case handling in each particular matter. Again, a client and their insurer oftentimes stand unified in the particular defense and strategic decisions to be utilized. But this is clearly not always the case and everyone involved in a particular claim is better served to recognize this up front so that all can work toward a unified, efficient and effective defense whenever possible.

In this regard, it is well recognized that there is a duty to cooperate throughout the handling of a particular matter, including gathering documents, witnesses, evidence and assisting in the defense of a particular matter. These issues can lead to disputes if the party does not assist the counsel and the carrier in defending a matter, including a potential denial of coverage for non-cooperation. In this regard, it is also important to determine the overall strategy of the defense, including an aggressive, all-out attack on the plaintiff's claims, a more cost effective approach or somewhere in between. It should also be determined up front as to which issues will be attacked, including liability and where it is better to save your credibility by not disputing an issue.

Many of these strategic decisions come into play during settlement discussions as well, including when policy limit demands are made, as it may lead to issues related to exposure to damages in excess of the policy limits, implementation of hammer clauses, especially in professional liability policies where there are reporting requirements which must be met.

Again, determining who is ultimately responsible for the result, who has authority to resolve a matter and the many overlapping and inter-related issues between the players on just your side of the lawsuit is critical to case handling in each and every claim and lawsuit.

Conclusion:

In the complex world of insurance, litigation and business, it is very important to determine who ultimately controls the defense and everyone's interests and issues at the beginning, middle and end of each matter in order to maximize areas of agreement, minimize disputes and obtain the best possible result for all.